

## Valdez, Heather

---

**From:** Gallagher, Shirin  
**Sent:** Tuesday, January 07, 2014 5:04 PM  
**To:** Keenan, John; Pavitt, John  
**Cc:** Hedgpeth, Zach; Valdez, Heather  
**Subject:** RE: Pogo incinerator

**Categories:** Pogo FOIA

### ATTORNEY WORK PRODUCT – ATTORNEY CLIENT PRIVILEGED COMMUNICATION

Hi all-

I took a quick look at John's draft briefing paper and have some thoughts to share.

First, I think we should all take a careful look at the dates they put into this draft Consent Order to make sure we agree that they're factually and legally true. This regulation is a bit of a strange beast. It defines a "new" unit as one that commenced construction after June 5, 2010. This source had a purchase order for the new incinerator in December 2010, was constructed in 2011 and started up in February 2012. The effective date of the regulation, however, was stayed for some period of time and did not actually become effective until August 7, 2013. This makes for a rather unusual situation where a source had compliance obligations prior to the "effective date" of the rule. If the Agency had stumbled across this case and were considering whether it was a good candidate for an enforcement action, I would counsel that this is one where we have lots of litigation risk and difficult arguments about why a source has obligations before the nominal "effective date" of the rule. I think this is relevant to the question of whether we should expand the scope of this potential settlement to include obligations that arguably arose before 8/7/2013.

Second, on the topic of economic benefit- if they stopped using their new incinerator and just continued to operate their old (more polluting) incinerator on August 7, 2013, they would have been in compliance, right? Doesn't that make their economic benefit something approaching zero? There is caselaw that says when calculating ec ben we need to consider their least costly option to comply, and operating the old (exempt) incinerator sounds like the cheapest method of compliance.

Finally, I think we should lay out a recommendation in the briefing paper as well. I am in favor of the option that takes up the least amount of the OCE's resources as I don't think this is a good case to demand a penalty in (at least for the pre August 2013) and that presents minimal environmental harm (especially if we compare it to the option that they had- as far as I know- to continue using their old incinerator).

Let me know your thoughts on all of the above and I can try to work on some succinct bullets to incorporate these ideas if that would be helpful.

Thanks,

Shirin Venus Gallagher  
Assistant Regional Counsel  
EPA Region 10  
Tel: 206-553-4194  
Email: [gallagher.shirin@epa.gov](mailto:gallagher.shirin@epa.gov)

This email may contain material that is confidential, privileged, and/ or work product for the sole use of the intended recipient. Any review, reliance, distribution by others, or forwarding without express permission is strictly prohibited. If you are not the intended recipient please contact the sender and delete all copies.

---

**From:** Keenan, John  
**Sent:** Tuesday, January 07, 2014 1:59 PM  
**To:** Keenan, John; Pavitt, John; Gallagher, Shirin  
**Cc:** Valdez, Heather; Hedgpeth, Zach  
**Subject:** RE: Pogo incinerator

[Now with Attachment!](#)

John E. Keenan  
U.S. EPA, Region 10  
1200 Sixth Avenue - Ste 900  
Seattle, WA 98101

206-553-1817  
206-553-0110 (fax)

---

**From:** Keenan, John  
**Sent:** Tuesday, January 07, 2014 1:35 PM  
**To:** Pavitt, John; Gallagher, Shirin  
**Cc:** Valdez, Heather; Hedgpeth, Zach  
**Subject:** Pogo incinerator

I talked w/ Scott shortly after our meeting w/ Pogo reps. He strongly suggested that I draft up a briefing paper and schedule a meeting w/ Ed. Attached is my first draft at the briefing paper. Let me know if you have any suggestions. I'll begin looking for a time slot soon.

Heather and Zach: Let me know if you'd like to attend the briefing.

John E. Keenan  
U.S. EPA, Region 10  
1200 Sixth Avenue - Ste 900  
Seattle, WA 98101

206-553-1817  
206-553-0110 (fax)